

COMPLIANCE BOARD OPINION NO. 01-18

August 8, 2001

Mary R. Craig, Esquire

The Open Meetings Compliance Board has considered your complaint on behalf of The Herald-Mail Company alleging that the Board of Education for Washington County (hereafter “County Board”) violated the Open Meetings Act in connection with a meeting on April 16, 2001 and meetings on other dates that were conducted without public notice. In its response, the County Board indicated that the April 16 meeting and related sessions of the County Board involved an executive function; therefore, the meetings were not subject to the notice or other provisions of the Act.

For the reasons set forth below, we conclude that the County Board’s meetings involving the evaluation of the school superintendent fall under the executive function exclusion from the Act. The response of the County Board, however, leaves unanswered the question whether any meeting concerned an agreement to pay the superintendent a specified sum in lieu of his continued employment for an additional year under the then-existing contract. In our view, this agreement is properly characterized as either a new contract or an amendment to the existing contract. Consequently, discussion of it would have constituted a quasi-legislative function under the Act, and a County Board meeting for this purpose would have been in violation of the Act if the Act’s procedural requirements were not followed. Because the County Board’s response lacks sufficient information for us to confirm whether such a meeting in fact took place, we can reach no conclusion on this aspect of your complaint.

I

Complaint and Response

Your complaint set forth in considerable detail efforts by a reporter of The Herald-Mail to confirm whether the County Board in fact held an unannounced meeting on April 16. The complaint appears to have been prompted, at least in part, by inconsistent replies received from individual members of the County Board in connection with the meeting. Your complaint also referred to possible violations on three alternative dates, February 27, March 6, and March 20, based on your review of billing records of the County Board’s legal counsel. You indicated that “[t]he Herald-Mail believes that the [County Board] met to consider amending

Superintendent Bartlett's contract or to discuss entering into a new contract with the Superintendent which required his resignation," an action that you suggested constitutes a quasi-legislative function under the Open Meetings Act.

In a timely response on behalf of the County Board, Judith S. Bresler, Esquire, legal counsel to the County Board, denied that the Act was violated on April 16 or on prior occasions referred to in the complaint. The County Board asserted that it was engaged in an executive function when it met on April 16. The purpose of the meeting, according to the response, was to evaluate the school superintendent's performance, an "executive responsibility under both state law and [the County Board's] local procedures." Therefore, the Open Meetings Act did not apply. In support of its position, the County Board relied on Compliance Board Opinion 95-5 (October 18, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 123. The County Board denied that there was any amendment to the superintendent's contract. Rather, the superintendent "resigned and essentially waived all but \$35,000 of the \$105,000 remaining to be paid on the last year of his contract."

The County Board also responded to the dates cited in your letter that were derived from legal services billing records. According to the County Board, the reference to February 27 concerned only a telephone call between counsel and an individual County Board member, rather than a meeting of the County Board. Concerning a March 6 meeting, the County Board simply noted that "Board members were entitled to assemble in order to perform their executive functions, including the evaluation of the superintendent's performance." The reference to March 20 included a conference call with the County Board and its legal counsel, concerning the superintendent's evaluation and performance.¹

II

Analysis

A. *Evaluation of Superintendent*

In prior opinions, we have explored at some length the multiple roles of local boards of education in carrying out their duties under the State education law,

¹ In its response, the County Board suggested that the complainant should be required to prove violations of the Act. There is no "burden of proof," however, in the evaluation of complaints by the Compliance Board. *See, e.g.*, Compliance Board Opinion 00-8 (August 4, 2000), slip op. at 3; Compliance Board Opinion 96-9 (October 15, 1996), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 178, 181.

including their responsibilities for both legislative and quasi-legislative functions, as well as executive functions, as these terms are defined under the Open Meetings Act. *See, e.g.*, Compliance Board Opinion 00-10 (October 18, 2000). Under the State education law, the County Board appoints the County's school superintendent, subject to the approval of the State Superintendent of Schools, and sets the superintendent's salary. §§4-201 and 4-202 of the Education Article. Implicit in these duties is oversight responsibility for the school superintendent's performance. Compliance Board Opinion 00-10, slip op. at 3. The County Board has also adopted a local policy addressing the evaluation of the superintendent's performance.

As the County Board correctly pointed out, we have previously recognized that a local board of education's evaluation of a school superintendent is an executive function, outside the scope of the Open Meetings Act. §10-503(a)(1)(i); Compliance Board Opinion 95-5 (October 18, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 123, 124. Thus, any meeting of the County Board that was limited to evaluation of the superintendent's performance was not subject to the Open Meetings Act. Neither the substantive nor procedural requirements of the Act applied, and no violation could have occurred.²

B. Other meetings

According to the County Board's response, only two of the dates specified in your letter involved meetings of the County Board: a meeting on March 6 and a conference call on March 20.³ However, the description of these meetings provided

² We note that the Open Meetings Act is not the only law governing meetings of the County Board. Section 3-1303 of the Education Article provides as follows:

(a) All actions of the County Board shall be taken after a public meeting and a record of the meeting and all actions shall be made public.

(b) This section does not prohibit the County Board from meeting and deliberating in executive session provided that all action is taken after a public meeting and the record of the meeting and all action is made public.

The Open Meetings Act provides that, in case of a conflict between the Act and other law relating to meetings of a public body, the more stringent provision applies. §10-504. Because our jurisdiction is limited to alleged violations of the Open Meetings Act, however, we express no opinion as to the application of §3-1303 of the Education Article. *See, e.g.*, Compliance Board Opinion 01-14 (July 10, 2001), slip op. at 2.

³ As the Attorney General has recognized, a conference call involving a quorum of a public body during which public business is conducted is a "meeting" subject to the Act. *See* Office of the Maryland Attorney General, *Open Meetings Act Manual* 7 (4th ed. 2000).

in the County Board's response was rather limited. As to the March 6 meeting, the response simply noted that "the Board members were entitled to assemble in order to perform their executive functions, including the evaluation of the superintendent's performance." As to the March 20 conference call, the response indicated that "the subject of the discussions ... was the superintendent's evaluation in which the Board had been engaged for some time."

Based on the limited information provided, we can do no more than observe that, if the sessions were indeed limited to the evaluation of the superintendent, the sessions fell within the definition of an executive function and therefore were not subject to the Open Meetings Act.

C. Superintendent's Compensation Agreement

In its response, the County Board denied that there was any amendment of the superintendent's contract. "At all times the County Board remained engaged in its executive responsibilities and did not become involved in a 'quasi-legislative' function." The County Board distinguished the facts here from Compliance Board Opinion 95-5, in which we held that the Act applied to the portion of a meeting at which a board of education discussed the amendment of a school superintendent's contract.

We are baffled as to the basis for the County Board's assertion that the agreement with the superintendent was neither a new contract nor an amendment to the existing contract. Although we are not privy to a copy of the original contract, we find it hard to imagine that it contained a buyout option at a predetermined rate. If it did not, then the superintendent's agreement with the County Board to resign and accept a lower sum in lieu of the contractual salary term amounted to a new contract or contract amendment. As we see it, even if the superintendent's agreement is called a "waiver" of most of the salary that would have been payable under the contract had he remained superintendent, the waiver is best understood as itself a contractual undertaking between the County Board and the superintendent.

Unless the County Board was simply applying a term in the existing contract, its action could not have been considered an executive function outside the scope of the Open Meetings Act. Instead, it was a quasi-legislative function subject to the Act. §10-502(j)(3). Doubtless the County Board could have lawfully closed the session under the exception for specific personnel matters, §10-508(a)(1), but only in accordance with the procedural requirements of the Act. Given that we have not seen the original contract nor been provided specific detail about the County Board's process for review and approval of the superintendent's salary "waiver," we lack sufficient information to reach a firm conclusion whether a new contract or amended

contract was approved at a particular meeting of the County Board.⁴ Therefore, we simply conclude that if the County Board discussed or entered into a new contract or amended the existing contract at a closed meeting that was not conducted in accordance with the Open Meetings Act, a violation of the Act occurred.

III

Conclusion

The County Board did not violate the Open Meetings Act when it held unannounced meetings for purposes of evaluating the school superintendent's performance, as that action constitutes an executive function under the Open Meetings Act. However, if the County Board discussed or acted on an agreement with respect to the superintendent's salary at a meeting, the meeting would have been involved a quasi-legislative function subject to the Act unless the County Board was simply implementing the terms of an existing contractual provision.⁵ Given the lack of sufficient information on this point, we express no opinion whether the Act was violated.

OPEN MEETINGS COMPLIANCE BOARD*

Courtney McKeldin
Tyler G. Webb

*Chairman Walter Sondheim, Jr. did not participate in the preparation or approval of this opinion.

⁴ The Open Meetings Act recognizes that there will be occasions where the Compliance Board is unable to reach a decision. *See* §10-502.5(f)(2).

⁵ In your complaint, you asked that we review for the County Board members the scope of the executive function exclusion. In several recent opinions, we considered the executive function exclusion at length, and therefore decline to repeat that analysis here. County Board members and others may wish to consult Compliance Board Opinion 00-10 (October 18, 2000), addressing the executive function exclusion as applicable to a local board of education, and Compliance Board Opinion 01-7, addressing the executive function exclusion generally, for guidance in this area.